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IN THE

SUPREME COURT OF THE UNITED STATES

No. 388

YOUR FOOD STORES, INC., (NSL), a New Mexico corporation, Respondent,

vs.

VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, et al., Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

YOUR FOOD STORES, INC., (NSL), a New Mexico corporation, Respondent,

vs.

VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, et al., Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Village of Espanola, New Mexico, a municipal corporation, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of New Mexico, restraining and enjoining Petitioner from collecting municipal sales tax from Respondent, a non-Indian supermarket operated upon lands leased from

the Santa Clara Pueblo Indians, which lands had been validly brought within the corporate limits of the municipal corporation Petitioner, for all purposes not inconsistent with Federal law and the Indians' right of self government.

Opinions Below

The opinions and orders below, both on the original decision and on motion for rehearing, are reported at 68 N.M. 327, 361 P.2d 1950. They are appended hereto as Appendix A.

Jurisdiction

The order sought to be reviewed was made and entered on April 10, 1961, and appears herein in Appendix A at the end of the original decision. An order denying a timely motion for rehearing was made and entered on June 8, 1961, and appears herein in Appendix A after the order sought to be reviewed. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. 1257 (3).

Questions Presented For Review

1. Whether a municipal corporation of the state of New Mexico may, consistent with Federal law and the Santa Clara Pueblo Indians' right of self government, impose a municipal sales tax upon a non-Indian supermarket corporation, conducting its business upon lands leased from the Santa Clara Pueblo Indians, but which lands have been annexed to and brought within the corporate limits of such municipal corporation.

2. Whether, insofar as the imposition of a municipal sales tax upon a non-Indian supermarket corporation, con-

ducting its business upon lands leased from the Santa Clara Pueblo Indians, is concerned, the annexation of such Santa Clara Pueblo Indian lands by such municipal corporation is prohibited by Federal law or violates the Indians' rights of self government.

Constitutional Provisions, Statutes and Ordinances Involved

Pertinent parts of all constitutional provisions, treaties, statutes and ordinances enumerated below are quoted verbatim in Appendix B, to-wit:

1. United States Constitution, Article I, Section 8, Clause 3.

2. Act of June 20, 1910; 36 Stat. 557, Chapter 310, Section 2, Clauses 2 and 8. (New Mexico Enabling Act).

3. New Mexico Constitution, Article XXI, Sections 2 and 8, and preamble.

4. Act of July 30, 1947, Chapter 389, Section 1; 61 Stat. 644, 4 U.S.C. Sections 105, 109 and 110 (Buck Act).

5. Act of August 15, 1953, Chapter 505, Sections 6 and 7; 67 Stat. 590.

STATEMENT OF THE CASE

All page references in this Statement of the Case are to the typewritten transcript of the record filed with the Clerk of this Court.

The pertinent and material facts of the case are as follows:

Petitioner, Village of Espanola, is a municipal corporation organized and existing under the Laws of the State of New Mexico. Respondent is a non-Indian, non-governmental, private corporation for profit, organized and existing under and by virtue of the Laws of the State of New Mexico, and is engaged in the operation of a supermarket and variety store within the city limits of the Village of Espanola in Rio Arriba County, New Mexico.

That the supermarket and variety store so operated by respondent is located on a tract of land subleased by respondent. That said tract of land so subleased is a portion of a larger tract of land leased by respondent's lessor from the Pueblo of Santa Clara. That the tract of land so subleased by respondent is a part of the Santa Clara Pueblo Grant which was patented by the United States of America to the Pueblo of Santa Clara in 1864, and title to which was quieted in the Indians of said Pueblo by the United States District Court for the District of New Mexico in 1931.

That in 1955 the Village of Espanola annexed to said Village certain contiguous territory which included the tract of land occupied by the supermarket and variety store of respondent, as well as other lands belonging to or lying within the exterior limits of the lands patented to the Pueblo of Santa Clara and other lands which were not Indian lands. None of the annexed land had at any material time been annexed to or made a part of the municipal limits of any other municipal corporation.

That the Indian inhabitants of the Pueblo of Santa Clara constitute a body politic and corporate; that said body corporate is the owner of the lands in question but there is no showing that the lands in question have been

made the subject of or brought into Santa Clara Pueblo acting or purporting to act as a municipal corporation for any purpose of municipal government or taxation, as distinguished from ownership in a proprietary capacity.

That effective January, 1959, the governing body of the Village of Espanola fixed and imposed a municipal sales tax on all retail business within the corporate limits of the municipality, including the business of respondent.

No question has been raised as to the validity of the annexation or of the sales tax except that respondent claims that the Village may not annex land of the Pueblo of Santa Clara and that such lands not being annexed to the Village of Espanola, the Village is unable to levy municipal taxes on its business.

These facts are taken from the trial court's Findings of Fact (52-55) which are not in dispute and are admitted to be true as may be seen by comparing them with respondent's Statement of the Case and of the Facts in its Brief in Chief in the Supreme Court of the State of New Mexico (143-154).

Respondent here filed suit against petitioner to enjoin collection of the municipal sales tax on sales made by its business enterprises (23-30). In its Amended Complaint (23-30) respondent alleged that it was not subject to the municipal sales tax of petitioner by reason of the fact that the lands upon which its business enterprises were situated and conducted were subject to the absolute and exclusive jurisdiction of the Pueblo of Santa Clara, and of the United States of America, and that petitioner municipal corporation was without jurisdiction to annex the lands leased by respondent, and that, therefore, the mu-

nicipal sales tax could not be operative upon sales made by respondent on said lands (38). Upon issue joined thereon (31) and tried to the trial court, the trial court resolved the issues in favor of petitioner in its Conclusions of Law, the material portions of which are as follows (55-57):

That by virtue of the annexation proceedings by the Village of Espanola in 1955, the lands in question herein upon which the plaintiff holds a sublease and conducts its supermarket and variety store were duly, regularly and lawfully annexed to the Village of Espanola, and thereupon came within the exterior boundaries of and became a part of the Village of Espanola for all purposes and subject to all ordinances and regulation and taxes not inconsistent with the Constitution and Laws of the United States and with the rights of self-government of the Indian members of the Santa Clara Pueblo.

That imposition of the municipal sales tax upon the business operations of respondent does not and will not impose any burden upon the Federal instrumentality, upon the Santa Clara Pueblo, or the Indian members thereof, nor will it conflict with any provisions of the Constitution of the United States or Federal laws, or the right of self-government in the Santa Clara Pueblo Indians.

That petitioner has the full and lawful authority to impose sales taxes upon business operations conducted by individuals, firms or corporations upon lands lying within the corporate limits of petitioner, including the lands upon which respondent conducts its business operations, and respondent is liable under law for the payment of said sales taxes as are all the other retail and pro-

fessional establishments within the corporate limits of petitioner.

Upon appeal to the Supreme Court of New Mexico, identical Federal questions were raised by Point I of respondent's Points Relied upon for Reversal, as contained in its Brief in Chief (155), to-wit:

"POINT I

THE DISTRICT COURT ERRED IN RULING THAT THE PURPORTED AND ATTEMPTED ANNEXATION BY APPELLEE VILLAGE OF ESPANOLA OF LANDS BELONGING TO THE PUEBLO OF SANTA CLARA AND BEING A PART OF THE SANTA CLARA PUEBLO GRANT, IN PARTICULAR, THAT PORTION THEREOF HELD UNDER SUBLEASE BY APPELLANT AND OCCUPIED BY ITS PLACES OF BUSINESS WAS A VALID AND LEGAL ANNEXATION.

"A. The proported and attempted annexation by appellee Village of Espanola of the Pueblo Lands in question was null and void because the State lacked the requisite jurisdiction over such lands to enable it to confer on the Village of Espanola power or authority to effect the attempted annexation.

"B. The purported and attempted annexation by appellee Village of Espanola of the Pueblo lands in question was null and void because to permit such annexation would infringe on the right of the Indians

of the Pueblo of Santa Clara to govern themselves and the lands of their Pueblo.

C. The purported and attempted annexation by appellee Village of Espanola of the Pueblo lands in question was null and void because the statute under which the Village sought to make such annexation did not provide the power or authority to annex lands belonging to the Pueblo of Santa Clara, which was itself a municipal corporation having governmental powers of equal dignity with those of the Village of Espanola."

The ruling of the Supreme Court of New Mexico sustained the aforesaid contentions of respondent as set out in its opinion, and orders as contained in Appendix A, hereto annexed, and holding that the municipal sales tax cannot be collected from respondent because the municipal annexation upon which said sales tax relies for its existence interferes with the Indian right of self-government (363); such a municipal sales tax as is here sought to be collected is not permitted by the "Buck Act", 4 U. S. C., Sections 105-110 (360); and such a municipal sales tax as is here sought to be collected is prohibited by the New Mexico Enabling Act, 36 Stat. 557 (356).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

POINT I.

A MUNICIPAL SALES TAX IMPOSED UPON A NON-INDIAN CORPORATION DOING BUSINESS ON INDIAN LAND DOES NOT CONSTITUTE INTERFERENCE WITH THE RIGHT OF SELF-GOVERNMENT OF THE PUEBLO OF SANTA CLARA OR ITS INDIAN INHABITANTS.

The New Mexico Supreme Court held in the instant case that *Williams vs. Lee*, 358 U. S. 217, 79 S. Ct. 289, 3 L. Ed 2d 251, was controlling in its consideration of the issues. Petitioner feels that there are several major distinctions between the issues in *Williams* and the issues in this case. Here, it is to be noted, neither party is Indian, nor is there any relationship to the Pueblo of Santa Clara involved. The tax sought to be imposed is not sought to be imposed upon any Indian or Indian transaction. The tribal court of the Pueblo of Santa Clara would have no jurisdiction over the petitioner or respondent in their dealings with each other or at all except where they might deal with members of the Pueblo of Santa Clara. The Pueblo of Santa Clara is not a treaty nation as was the Navajo tribe in *Williams*.

In *Williams*, the controlling factors were as follows:

1. The defendant was an Indian;
2. The cause was within jurisdiction of the tribal court;
3. The Navajo Tribe had a treaty with the United

States conferring tribal court jurisdiction in matters of this nature; and

4. Congress had passed no legislation authorizing a suit in state court against an Indian for debt.

The foregoing factors led the court in *Williams* to the conclusion that the state action infringed on the right of an Indian to make his own laws and to be ruled by them.

We submit that these considerations are entirely lacking in this case. The only manner in which it could be contended that the annexation of a portion of the Santa Clara Pueblo Grant to the Village of Espanola and the resulting imposition of a sales tax upon a non-Indian merchant on the annexed area offends the right of the Indian to make his own laws and to be governed by them, is if placing a portion of pueblo lands within the boundaries of a political subdivision of the nature of a municipality, per se, causes that infringement upon the rights of the Indians. The record is barren of any testimony to the effect that this action or any action of the Village of Espanola has, as a matter of fact, caused any interference with such Indian rights.

There can be no question but that the area comprising the Santa Clara Pueblo Grant is within the State of New Mexico. It is likewise within the county of Rio Arriba. Its inhabitants vote for state and county officers in our elections. It is likewise within a precinct of Rio Arriba County because the New Mexico Constitution, Article 7, Section 1, requires that a voter present himself at the precinct in which he resides in order to cast his ballot. The State of New Mexico is likewise divided into other political subdivisions such as school districts in which

are included Indian lands such as the Pueblo of Santa Clara Grant. What, then, is sacred insofar as this area of Indian land is concerned with respect to including it within the boundaries of a municipality? We submit that there is nothing any more repugnant to Indian rights in the inclusion of a portion of their land in a municipality than there is in including it within the boundaries of a county or, for that matter, a state. Historically, the Indian tribes were considered as nations. *Worcester vs. Georgia*, 31 U. S. 515, 6 S. Ct. 515, 8 L. Ed 483, and the regulation of them was the responsibility of the Congress of the United States. This did not prevent the inclusion of their lands within the boundaries of the various states.

It is true that under the language of *Worcester* the states had absolutely no jurisdiction over the areas of the Indian nations; however, as this Court pointed out in *Williams vs. Lee, supra*, the Court has modified this rule where essential tribal relations are not involved and where the rights of Indians will not be jeopardized in matters such as suits by Indians against non-Indians in state court, and the trial of non-Indians committing offences against other non-Indians on the Indian reservation. This the Court has done without the benefit of acts of Congress. Under this Point, it is this power of the Court which petitioner seeks to invoke for the reason that no essential tribal relation or right of Indians is involved in the issues of this case.

The right of states and their political subdivisions to tax non-Indians conducting commercial operations upon Indian lands where no tribal right or relationship is involved, has long been recognized by this Court as not being an interference with the basic right of Indians to

govern themselves. *Utah and Northern Railway vs. Fisher*, 116 U. S. 28, 6 S. Ct. 246, 29 L. Ed. 542; *Truscott vs. Hurlbut Land, etc. Co.*, 73 Fed. 60; *Wagoner vs. Evans*, 170 U. S. 588, 18 S. Ct. 730, 42 L. Ed. 1154; *Maricopa and Phoenix Railroad vs. Arizona*, 156 U. S. 347, 15 S. Ct. 391, 39 L. Ed. 447.

In this connection, we feel that the reasoning employed by this Court in *Howard vs. Commissioners*, 344 U. S. 624, 73 S. Ct. 464, 97 L. Ed. 617, is particularly appropriate. It did not deal with Indian lands, but rather with the right of a municipality to include within its borders a United States Naval Ordnance plant, and to impose municipal taxes upon private activities and properties therein. No danger to the right of Federal control over its ordnance plant was deemed inherent in the annexation per se of such ordnance plant by the city of Louisville, Kentucky, and equated therewith, no danger is inherent in the annexation per se of a portion of Santa Clara Pueblo lands by the Village of Espanola.

As was pointed out by the Court in *Howard*, it is not the change of municipal boundaries which is repugnant to the exercise of Federal jurisdiction, but rather specific acts which interfere with the right of the Federal Government to exercise dominion over its properties, whether these acts are by a state, county or municipal government. In that case, if a municipality had attempted by zoning regulations to dictate the placing and type of structures upon the Federal installation, such action would be invalid. In this case, if the Village of Espanola attempted by its ordinances to dictate to the Pueblo of Santa Clara what structures it should place on its lands, or require municipal taxes to be paid by Indians, such action would

be invalid, but this would not invalidate the annexation itself under the rationale of *Howard*.

Nowhere in the travels of this case from the trial court through the Supreme Court of New Mexico has it been contended by respondent that the municipal sales tax itself interfered with the right of the Indians to self-government, but rather respondent contended and the New Mexico Supreme Court ruled that the annexation per se constituted such an interference. We submit that if the annexation of a naval ordnance plant over which the United States government has exclusive jurisdiction does not constitute an infringement upon Federal rights as a matter of law, neither can the annexation of the lands of the Pueblo of Santa Clara into the Village of Espanola constitute interference with Indian rights as a matter of law. The record is silent as to actual interference with Indian rights and there being no showing of any actual violation or ousting of tribal jurisdiction over such lands, the annexation should be ruled valid and respondent required to pay the tax imposed by the Village.

As the Court said in *Howard*:

> "The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed."

POINT II.

THE CONSENT OF CONGRESS HAS BEEN GIVEN TO THE IMPOSITION OF THE TAX IN QUESTION BY VIRTUE OF THE BUCK ACT, 4 U. S. C. 105-110.

As this Court stated in *Williams vs. Lee*, supra, there are two methods by which states may acquire jurisdiction over various matters on Indian lands. The first is by a finding of this Court that such action does not constitute an infringement upon Indian rights, and the second is by virtue of specific Acts of the Congress of the United States.

Respondent submits that the Buck Act, Act of July 30, 1947, Chapter 389, Section 1; 61 Stat. 644; 4 U. S. C. 105-110, has conferred this jurisdiction upon the State of New Mexico and its political subdivision, the Village of Espanola. The Court below denied application of the Buck Act by stating that the definition of Federal area as contained in Section 110 (e) of the Act did not include the lands of the Pueblo of Santa Clara. Section 110 (e) provides:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such state."

Standing by itself there might be a question as to whether this provision was designed to cover Indian lands. However, Section 109 of the Buck Act provides:

"Nothing in Section 105 and 106 of this Title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

If the Buck Act did not contemplate the inclusion of Indian lands within its definition of a "Federal area" for purposes of taxation of non-Indian properties and commercial operations situate and conducted upon Indian lands, then Section 109 of the Buck Act would have been completely unnecessary and impertinent to the Act.

The Supreme Court of New Mexico held that the right to tax depended upon the right to exercise jurisdiction. This is in complete disregard of Section 108 of the Buck Act which states that it shall not be deemed to deprive the United States of exclusive Federal jurisdiction where it would otherwise have such exclusive jurisdiction. Under the Constitution of New Mexico, Article XXI, Section 2, the Indian lands in question here are under the exclusive jurisdiction of the United States to the same extent that the United States exercises exclusive jurisdiction over certain lands under the provisions of Article I, Section 8, Paragraph 17 of the Constitution of the United States.

The purpose of the Buck Act was to correct inequitable situations where people doing business off a Federal reservation paid state and local taxes and where those living on Federal reservations did not pay such taxes. Such a situation is present in this case where a business within the original corporate limits of the Village or within the portion of the annexed area which is not within Santa Clara Pueblo lands are required to pay state and local taxes, and where respondent, because of the fortuitous location of its enterprise, is relieved from the pay-

ment of those taxes and given a competitive advantage over neighboring supermarkets.

In this instance, again, we believe that *Howard vs. Commissioners, supra,* is persuasive, if not absolutely controlling. In *Howard* the area involved was an area of exclusive Federal jurisdiction, being an ordnance plant. In this case the area involved is an area of exclusive Federal jurisdiction under the terms of Article XXI, Section 2 of the New Mexico Constitution. As has been pointed out before, the question of annexation is identical. Likewise, the question of applicability of the Buck Act is identical.

In *Howard* the Court specifically held that the area remained within the exclusive jurisdiction of the United States, but that under the Buck Act the City of Louisville had the authority to impose local taxes as if the Federal Government were not there. We submit that there is no difference between the words "exclusive legislation" as used in Article I, Section 8, Paragraph 17 of the Constitution of the United States, and the words "absolute jurisdiction" as used in Article XXI Section 2 of the Constitution of New Mexico. Under the former term this Court held in *Howard* that the City of Louisville could include within its boundaries and levy taxes within an area under the exclusive legislative dominion of the Congress of the United States by virtue of the Buck Act.

In this case we ask this Court to hold that the Village of Espanola is permitted to include within its boundaries and levy taxes within an area which is under the absolute jurisdiction of the Congress of the United States, which request is no different in substance from the relief which this Court granted in *Howard.*

POINT III.

NEITHER THE ENABLING ACT FOR NEW MEXICO NOR THE CONSTITUTIONAL PROVISIONS OF NEW MEXICO ENACTED PURSUANT THERETO PROHIBIT THE ANNEXATION OF INDIAN LANDS WITHIN A MUNICIPALITY, AND THE LEVYING OF MUNICIPAL TAXES UPON NON-INDIAN TRANSACTIONS THEREIN.

The lower court held that the Enabling Act for New Mexico, Act of June 20, 1910; 36 Stat. 557, Chapter 310, Section 2, Clauses 2 and 8, and the sections of the New Mexico Constitution which the Enabling Act required the people of New Mexico to adopt, Article XXI, Sections 2 and 8, deprived the State of New Mexico of jurisdiction over the area upon which respondent's business enterprises are located. Specifically, the lower court held that the State of New Mexico did not have jurisdiction to authorize a municipality to include within its boundaries an area owned by the Pueblo of Santa Clara. In this connection, the Court relied primarily upon its prior decision in *State vs. Begay*, 63 N. M. 409, 320 P. 2d 1017, certiorari denied 357 U. S. 918, 78 S. Ct. 1359, 2 L. Ed. 2d 1363. *Begay*, however, involved a far different factual situation. There the State of New Mexico in state court sought to prosecute a Navajo Indian for the crime of driving while intoxicated, allegedly committed while driving on a state road located on the Navajo Indian Reservation. It is obvious that *Williams vs. Lee, supra*, is controlling in that situation for the tribal court had jurisdiction over the acts of a Navajo Indian on his reservation, and for the state government to interfere would amount to an ouster of that jurisdiction and to an obvious

interference with the Indian right of self-government. This case is entirely different. As has been pointed out, there are no Indian relationships involved, no tribal court of the Santa Clara Pueblo could have jurisdiction over either of the parties, and if the courts of New Mexico do not have jurisdiction, then there is a complete lack of jurisdiction in any court.

The language employed by the Supreme Court of New Mexico in both *Begay* and the present case, and in the later case of *Vallez vs. Johnson*, ———N. M. ———, 362 P. 2d 1004, shows without question that the Supreme Court of New Mexico has adopted a construction of the Enabling Act and Article XXI, Sections 2 and 8 of the New Mexico Constitution which is based upon territorial jurisdiction, and that alone. The New Mexico Supreme Court has stated:

> "The State of New Mexico lacks jurisdiction over Indian lands within the state until and unless the title of the Indian or Indian tribes shall have been extinguished. • • •
>
> "Since the state has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the state did not affect the beneficial title, there is no basis upon which the state can claim jurisdiction." (*State vs. Begay, supra*).

Thus it is that the Supreme Court of New Mexico considers Indian reservations and Indian lands a type of island within the State of New Mexico over which the state has absolutely no jurisdiction for any purpose. It was on this basis that the lower court determined that the State of New Mexico lacked jurisdiction to authorize

the municipality of Espanola to include within its boundaries a portion of contiguous lands owned by the Santa Clara Pueblo.

We submit that this is an erroneous construction of the Enabling Act and of the Constitution of the State of New Mexico. It was the intention of the Congress of the United States that the Indians and their lands remain subject to the absolute control of the Congress, but not that the general area of the reservation be excluded from the State of New Mexico as though it were in effect a separate nation. This Court, without the benefit of Congressional action, has declared that state courts have the power to try and punish non-Indians who commit crimes against other non-Indians on an Indian reservation. *New York ex rel. Ray vs. Martin*, 326 U. S. 496, 66 S. Ct. 307, 90 L. Ed. 261. In fact, the holdings of this Court have gone even further. In *Draper vs. U. S.*, 164 U. S. 240, 17 S. Ct. 107, 41 L. Ed. 419, it was held that the United States District Court had no jurisdiction over the crime of murder committed upon an Indian reservation where an Indian was not involved either as victim or defendant, but that such jurisdiction rested solely with the state courts. The latter case is particularly applicable in view of the fact that it arose within the state of Montana which has a constitutional provision identical in substance with the disclaimer clause contained in Article XXI, Section 2 of the Constitution of New Mexico.

In view of the fact that the Federal court has no jurisdiction over crimes committed by non-Indians against non-Indians on reservations under the rule announced in *Draper*, and in view of the absolute holding of the New Mexico Supreme Court in *Began* that the state court has

no jurisdiction over Indian reservations, and in view of the fact that the tribal courts have no jurisdiction unless an Indian is involved, if the theory of jurisdiction advanced by the New Mexico Supreme Court is to be the rule in New Mexico, then crimes committed by non-Indians against non-Indians on Indian reservations will go unpunished by virtue of a lack of jurisdiction in any court to try the offender. The fallacy of the position of the New Mexico Supreme Court is shown by this one example of the inevitable result of its concept of the jurisdiction of the State of New Mexico over the Indian reservations within the boundaries of the State.

Likewise, if this concept of jurisdiction is to endure, than how can it be said that the Indian's right to vote is protected, for if this area is not a part of the State of New Mexico and the state has no jurisdiction over it, then an Indian cannot become a resident of New Mexico by living on it. *Arledge vs. Mabry*, 52 N. M. 303, 197 P. 2d 884. Such a concept of jurisdiction does not amount to protection of the Indian and his right to self-government. Its result will be to deny to the Indian the benefits of residence in the state of the basic rights of citizenship. It will create on the Indian reservations areas of lawlessness, havens for tax evaders, and create strife amongst the Indian and the non-Indian. Such a result was not and could not have been the purpose of the Congress of the United States in requiring the disclaimer clause in the Constitution of the State of New Mexico. As this Court pointed out in *Draper*, enabling acts are to be construed, if possible, so as to bring all states into the Union as equal members of the Union. To construe the Enabling Act as the lower court has, is to deprive New Mexico of that equality insofar as it relates to the right

which all states have to conform their municipal structures to their own plans, so long as there is no interference with the ultimate power of the Congress of the United States. *Howard vs. Commissioners, supra.*

POINT IV.

THE JURISDICTION WHICH THE STATE OF NEW MEXICO HAD TO AUTHORIZE THE INCLUSION OF INDIAN LANDS WITHIN MUNICIPAL BOUNDARIES AND THE EXERCISE OF TAXING POWER THEREIN AGAINST NON-INDIANS WAS NOT DIVESTED BY THE ACT OF AUGUST 15, 1953, CHAPTER 505, SECTION 6; 67 STAT. 590.

As an additional ground for its decision, the lower court stated that its conclusions were bolstered by the fact that in 1953 the Congress of the United States passed an Act to give its consent to the state to assume jurisdiction over Indians within its boundaries upon amending its constitution to remove any legal impediment to such jurisdiction. The Act referred to was the Act of August 15, 1953, Chapter 505, Sections 6 and 7, 67 Stat. 590. This Act did not change the existence of jurisdiction at all. If jurisdiction was absent in the state, then it merely gave permission for the states to acquire it by amending their constitutions. If jurisdiction was present in the state, the Congressional enactment, being permissive, granted or prohibited nothing. This may be seen from the first phrase of Section 6, which provides:

> "Notwithstanding the provisions of any enabling act for the admission of a state, the consent of the United States is hereby given. * * *"

Petitioner does not contend that the Act of August 15, 1953 gave it any additional rights, but neither does it agree that such Act took away any rights which were theretofore held either by it or the State of New Mexico.

It is the contention of petitioner that the State of New Mexico and its political subdivisions have had at all times since the admission of New Mexico into the Union, jurisdiction over non-Indians on Indian land, so long as the exercise of that jurisdiction did not interfere with the right of the Indian to govern himself. The annexation is necessary to the exercise of that jurisdiction and does not interfere with the rights of any Indian or Indian tribe. The assessment of a municipal sales tax in that area upon respondent which is a non-Indian, non-governmental, private corporation for profit, could have no effect upon the basic Indian right of self-government.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

WALTER R. KEGEL,
EDWIN L. FELTER,

P. O. Box 1159,
Santa Fe, New Mexico,

Attorneys for Petitioner.

APPENDIX A

OPINION, ORDERS AND MANDATE OF NEW MEXICO SUPREME COURT.

ITEM 1. OPINION

NOBLE, Justice.

The single question for determination is whether a municipality may lawfully extend its corporate limits to include lands of an Indian tribe and to enforce, within such lands, a municipal sales tax against a business located upon land leased from the Indian tribe.

No question is raised as to validity of the sales tax ordinance nor as to the annexation proceedings if the municipality could legally annex Indian lands.

It is contended that the jurisdiction of the State of New Mexico does not extend to lands owned or held by a Pueblo Indian tribe; that the purported annexation of such lands is void, and that the municipal sales tax ordinance is enforceable only within the municipal boundaries.

The Santa Clara Pueblo owns and occupies a tract of land as communal or tribal lands patented to the Pueblo by the United States pursuant to an Act of Congress confirming a claim of a grant to the Indian tribe by the King of Spain, a former sovereignty. Appellant occupies and operates a supermarket and variety store upon a portion of the Indian lands, contiguous to the Village of Espanola, subleased to appellant from a lessee of the Pueblo with approval of the Secretary of the Interior.

In 1955 the Village of Espanola purported to extend its boundaries, pursuant to § 14-6-11 N.M.S.A. 1953 Comp.

to include the land leased by appellant and other lands, and in 1959, by Ordinance No. 132, imposed a municipal sales tax upon sales and services within its corporate limits.

It is not questioned that a municipality is granted power to levy and collect a municipal sales tax only within its corporate limits, § 14-42-25 N.M.S.A. 1953 Comp., and that if these lands were not validly brought within the corporate limits the tax cannot be collected from appellant. The case proceeds here upon the assumption that the limits of the village are determinative of those within which the sales tax may be imposed. The trial court predicated its dismissal of the complaint seeking to enjoin collection of the tax upon three principal grounds: First, that by virtue of the lease to appellant the Santa Clara Pueblo divested itself of the right of possession, dominion and control of the lands included in the lease; second, that the municipality, had the legal right and did lawfully annex the lands, and that the same became a part of the municipality for all purposes and subject to all ordinances, regulations and taxes, not inconsistent with the Constitution and laws of the United States, or with the right of self-government of the Indian members of the Santa Clara Pueblo; and, third, that the sales tax does not impose any burden upon a federal instrumentality, upon the Santa Clara Pueblo or the Indian members thereof, and does not conflict with the Constitution of the United States nor with the right of self-government of the Santa Clara Pueblo Indians.

We are thus, first brought to a consideration of the status of Indian tribes, Indian lands, and the jurisdiction of the state of New Mexico, by legislation to exercise control over Indians living on a reservation or lands owned

by Indian tribes. It is clear that if the State itself cannot impose its laws on the Pueblo, the Village of Espanola, as a political subdivision of the State, cannot be conferred powers which the State itself does not possess. Munro v. City of Albuquerque, 48 N.M. 306, 150 P. 2d 733.

The early landmark case of Worcester v. Georgia (1832), 6 Pet. 515, 31 U.S. 350, 8 L.Ed. 483, in an exhaustive opinion by Chief Justice Marshall, developed that the Indian tribes are distinct political entities, with the right of self-government, having exclusive authority within their territorial boundaries and are not subject to the laws of the State in which they are located nor to federal laws except where federal laws or the jurisdiction of courts is expressly conferred by federal legislation. The court there held invalid a Georgia statute prohibiting and making it an offense for a non-Indian to go upon lands of an Indian reservation, as invading the right of the Indians to self-government.

The broad principles of the Worcester decision have been adhered to by the federal courts ever since. The Kansas Indians, 5 Wall. 737, 18 L.Ed. 667; Ex parte Crow Dog, 109 U.S. 556, 27 L.Ed. 1030; United States v. Kagama, 118 U.S. 375, 30 L.Ed. 228; United States v. Forness, 125 F. 2d 928; Iron Crow v. Oglala Sioux Tribe, 231 F. 2d 89. These basic principles were reaffirmed as late as Williams v. Lee, 358 U.S. 217, 3 L.Ed. 2d 251 (1959).

The early policy of leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history. Rice v. Olson, 324 U.S. 786, 89 L.Ed. 1367 (1945).

Without quoting extensively from the many decisions of the Supreme Court of the United States determining

the jurisdiction of states and of the state and federal courts over Indians, we think the decisions are well summarized in Felix S. Cohen's Handbook of Federal Indian Laws, and is thus stated at page 122:

> "Section 2. The Derivation of Indian Powers. From the earliest years of the Republic the Indian tribes have been recognized as 'distinct, independent political communities' . . . and as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.
>
> • • • •
>
> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g. its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

To our minds, the terms upon which New Mexico was admitted as one of the states of the Union and Article

XXI, Sec. 2 of our Constitution, left no room for a claim by the state to governmental power over the Indians or Indian lands, except where such jurisdiction has been specifically granted by Act of Congress, or sanctioned by decisions of the Supreme Court of the United States. The pertinent part of section 2 of the Enabling Act reads:

> "Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title * * * to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain under the exclusive jurisdiction and control of the Congress of the United states * * *."

That compact between New Mexico and the United States was carried out by adoption of Article XXI, Sec. 2 of the State Constitution. The Pueblo Indians have the same right of self-government as other Indian tribes. The Indian Reorganization Act, 48 Stat. 984, as amended, 25 U.S.C.A., § 461 et seq. See United States v. Sandoval, 231 U.S. 28, 58 L.Ed. 107; United States v. Candelaria, 271 U.S. 432, 70 L.Ed 1023; Toledo v. Pueblo de Jemez, 119 F. Supp. 429; The Pueblo Lands Act, 43 Stat. 636. That the provisions of the Enabling Act and New Mexico Constitution were intended to apply to Pueblo Indians cannot be doubted. Section 8 of the Enabling Act provided:

> "Eighth. * * * and the terms 'Indians' and 'Indian Country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them."

It has been suggested that the silence of Congress to enact legislation defining where jurisdiction rests in specific matters discloses no objection by Congress to the operation of state laws over Indians and Indian lands. That, at least, can no longer be said to be a valid construction. Indian tribes were given the right of self-government by Congress. Wheeler-Howard Act, 25 U.S.C.A., § 476, which reads:

> "Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe • • •."

The Santa Clara Pueblo adopted and acts under a written constitution. Federal Indian Law, p. 915. It is conceded that the Santa Clara Pueblo is self-governing. We think that the Pueblo Indian tribes possess inherent sovereignty except where it has been specifically taken from them by congressional action. This is additionally attested to by the fact that Congress did specifically act in 1953 to give its consent to the State to assume jurisdiction over the Indians within its boundaries, but prohibited the State from exercising such jurisdiction until the State should amend its Constitution or statute, as the case may be, removing any legal impediment to such assumption of jurisdiction. Act of August 15, 1953, C. 505 §§ 6 and 7; 67 Stat. 590. New Mexico has not seen fit to amend sec-

tion 2 of Article XXI of the Constitution and has not accepted jurisdiction over the Indians.

Appellee relies upon Anderson v. Brule County, 67 S.D. 308, 292 N.W. 429, holding that the provisions of an enabling act indentical with that of New Mexico were inserted to permit supreme powers by the United States to fulfill its obligations to the Indians rather than to withhold power from the states to exercise limited jurisdiction over Indian reservations, and that it was intended that the states should exercise limited jurisdiction over such Indian reservations unless Congress specifically acted on the subject. That court sustained the right of the State to include Indian lands within the corporate limits of a municipality. The reasoning there expressed is contrary to the expressed intention and construction by Congress, 67 Stat. 590; contrary to our decision in State v. Begay, 63 N.M. 409, 320 P. 2d 1017; and is denied by the Supreme Court of the United States in Williams v. Lee, supra, where it was said:

> "Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied."

Examples of express grants of the exercise of jurisdiction by states denied them by Worcester v. Georgia, supra, are the Acts of Congress making various state laws, such as laws respecting health and education, applicable on Indian reservations. Title 25 U.S.C.A., § 231.

Those decisions relied upon by appellee which have recognized the right of a state or its political subdivision to annex lands acquired by the United States for neces-

sary governmental installations are distinguishable. They do not rest upon the right of self-government by the residents thereof. Likewise, those decisions which sanction the jurisdiction of state courts when invoked by an Indian against a non-Indian or between two non-Indians with respect to a transaction occurring on an Indian reservation do not support the contention of jurisdiction to include Indian lands within the boundaries of a municipality so as to make such lands subject to the rules, regulations or ordinances of the municipality. Suits by Indians against non-Indians in state courts have been sanctioned by the United States Supreme Court, Felix v. Patrick, 145 U.S. 317, 12 S. Ct. 862, 36 L.Ed. 719. And non-Indians who committed crimes against each other on a reservation may be tried in the state courts. New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S. Ct. 307, 90 L.Ed. 261. These are modifications of the principles of Worcester v. Georgia, supra, made over the years by the Supreme Court of the United States as not jeopardizing the rights of Indians nor invoiving essential tribal relations or the right of self-government. Williams v. Lee, supra.

Although not relied upon by appellee, we notice three decisions of this court concerning the jurisdiction of the state courts over reservation Indians. In Trujillo v. Prince, 42 N.M. 337, 78 P. 2d 145, the personal representative of a reservation Indian was permitted to invoke the jurisdiction of a state court and the protection of the New Mexico Wrongful Death Statute against a non-Indian. This comes within one of the few modifications of the doctrine of Worcester v. Georgia, supra. Martinez v. Martinez, 49 N.M. 83, 157 P. 2d 484, allowed the state court as successor to the territorial court to enforce a consent decree entered by the territorial court in 1893

adjudicating water rights of a Pueblo, in which the Pueblo was represented by an attorney employed by the United States. Indians are bound by the decisions of the state courts if they invoke its jurisdiction. United States v. Candelaria, supra.

This court sustained the jurisdiction of the state court in Tenorio v. Tenorio, 44 N.M. 89, 98 P. 2d 838, in a divorce action between two Pueblo Indians living on Pueblo Indian lands.

While Anderson v. Brule County, supra, (decided June, 1940) does not cite Tenorio v. Tenorio, supra, (decided January, 1940), both rest largely upon the same reasoning, i.e., the failure of Congress to act specifically amounted to an implied consent to the exercise of State jurisdiction. However, our decision in Tenorio v. Tenorio, supra, was prior to enactment by Congress of 67 Stat. 590, authorizing exercise of State jurisdiction over Indians only after adoption of an amendment to the State Constitution accepting such jurisdiction, Whyte v. District Court, 140 Colo. 334, 346 P. 2d 1012; is contrary to our later decision in State v. Begay, supra, and the jurisdiction there sustained has since been expressly denied by Williams v. Lee, supra.

It is urged and the trial court concluded that by virtue of its lease "the Santa Clara Pueblo divested itself of the right of possession, dominion, and control of said lands during the time such land were subject to said mesne leases." We cannot agree. Whatever rights the Pueblo may have divested itself of, the title of the Indians was not thereby extinguished within the meaning of either the Enabling Act or the Constitution so as to vest the State with jurisdiction. In State v. Begay, supra.

an easement was granted the State for a highway through the Navajo reservation, but we said respecting State jurisdiction over an Indian arrested for a traffic violation on the highway within the reservation:

> "We hold that the authority under which the State was permitted to construct Highway 666 through, and over, the Navajo reservation failed to extinguish the title of the Navajo Indian Tribe."

Appellee further seeks to justify the right to exact the sales tax by contending that Congress has specifically authorized the imposition of a sales tax by the Buck Act, Title 4 U.S.C.A., § 105(a) which reads:

> "a. No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority thereon, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal Area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal Area within such state to the same extent and with the same effect as though such area was not a Federal Area."

Section 110(e) of the Act defines Federal Area:

> "The term 'Federal Area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; * * *."

By the statutory definition of "Federal Area" it is-

obvious this statute does not give the states permission to levy a sales tax upon Indian lands. These lands are not lands or premises held or acquired for use of the United States or any department, establishment or agency of the United States. Additionally, section 105(a) limits the right to levy a sales tax to a "taxing authority having jurisdiction to levy such a tax." If the municipality was without jurisdiction to annex the Indian lands it is not a taxing authority with jurisdiction to levy such taxes within the Indian lands.

The principal concern, however, in the instant case is not whether the property or non-Indians located on a reservation may be taxed either by the State or its political subdivisions, but, rather, whether the Pueblo lands may lawfully be annexed to and be made a part of a municipality theretofore lying outside the boundaries of such Indian lands. It is not the taxation of non-Indian property that would infringe upon the rights of the Indians to self-government but that of making that portion of the Indian territory subject to legislative action by the municipality. It is clear that the State of New Mexico has no power to legislate for the Pueblo nor to make its people subject to state laws, Toledo v. Pueblo de Jemez, supra, and if the State cannot impose its laws on the Pueblo it is equally clear that it cannot confer upon the Village of Espanola powers which the State itself does not possess. Munro v. City of Albuquerque, supra.

There has been no question since United States v. Sandoval, supra, that the Pueblo Indians do not derive their governmental powers from the State of New Mexico. Toledo v. Pueblo de Jemez, supra. It must, likewise, be conceded that two self-governing bodies cannot have dual

and coexistent jurisdiction and control within the same territory at the same time. In re Sandia Conservancy District, 57 N.M. 413, 259 P. 2d 577. They are not here exercising functions for different purposes within the same boundary.

Appellant argues that this is a collateral attack on the validity of the annexation proceeding and not permitted. We are familiar with the general rule that where there is authority and jurisdiction to annex territory to a municipality, its validity can not be questioned in a collateral proceeding by reason of defects, informalities and irregularities in the proceedings. It is different, however, when there is a complete lack of authority or jurisdiction. 2 McQuillan on Municipal Corporations (3rd. Ed.) § 7.43 and cases cited. There being no authority or jurisdiction for the annexation it never had and does not now have any validity and may be collaterally attacked. Hillman v. City of Pocatello, 74 Ida. 69, 256 P. 2d 1072; Barton v. Stuckey, 121 Okla. 226, 248 P. 592; Griffing Park v. City of Port Arthur (Tex. Civ. App.), 36 S.W. 2d 593. It is admitted that the Santa Clara Pueblo did not sign the annexation petition.

§ 14-6-11 N.M.S.A. 1953 Comp., provides that territory annexed to a municipality becomes a part of it for all purposes and is subject to its legislative action, but, appellee says this is intended to mean "for all lawful purposes," and that any legislative acts of the municipality in conflict with federal law or treaty obligations is not a lawful purpose. Counsel does not cite any authority to support this position, nor does he point out any other "lawful purpose which would not infringe upon the right of self-government of the Indians, other than taxation against non-Indians. It is not an answer to say that

no ordinance of the village, except the municipal sales tax, shall be effective within the Indian lands within the Village. To follow appellee's argument to its logical conclusion would mean that there would have to be a court decision as to each ordinance in order to determine that the same had a "lawful purpose" insofar as it affected Indian lands.

The only question before us is the power of a municipality to extend its municipal limits to include Indian lands and to enforce the collection of a municipal sales tax limited by statute to the municipal boundaries. The right of the State to tax non-Indians or their property located within an Indian reservation is not before us and we do not decide it.

We consider Williams v. Lee, supra, controlling. It was there said:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their owns laws and be ruled by them."

There, the right was denied a non-Indian to maintain an action, in the State court, against a reservation Indian for debt contracted on the reservation as infringing on the rights of Indians to govern themselves.

To paraphrase Williams v. Lee, supra, we conclude that to allow the exercise of jurisdiction by a municipality to annex a portion of the Indian Pueblo and make it subject to jurisdiction of a municipality would affect the authority of the tribal council over reservation affairs and, hence, would infringe on the right of the Indians to

govern themselves. Especially is this true, in view of the fact that New Mexico has not only been granted the right by Congress to exercise jurisdiction over the Indians but has been expressly denied that jurisdiction until the State amends its Constitution, and that it has not assumed such jurisdiction in the manner provided by Congress. We can only assume that by its failure to take the necessary action to acquire jurisdiction it has determined it does not want to do so.

It follows that the purported annexation of the lands in question was void and that said property is not within the corporate limits of the Village of Espanola, and that the municipal sales tax cannot be collected from appellant.

The cause is reversed and remanded with instructions to vacate the judgment entered herein; to substitute as a party defendant the present and acting Commissioner of the Bureau of Revenue of the State of New Mexico, and to enter judgment restraining and enjoining the collection of the municipal sales tax as prayed for in the complaint, and for such other action as may be required not inconsistent with the views expressed herein.

IT IS SO ORDERED.

S/ M. E. NOBLE
Justice

WE CONCUR:

S/ J. C. COMPTON, C. J.
S/ DAVID W. CARMODY, J.
S/ DAVID CHAVEZ, Jr. J.
S/ IRWIN S. MOISE, J.

FILED: APRIL 10, 1961

Item 2. **Order Reversing District Court Judgment. YOUR FOOD STORES, INC., (NSL), a New Mexico Corporation, Appellant vs. VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, and ROBERT VALDEZ, Commissioner of the Bureau of Revenue of the State of New Mexico, Appellees. New Mexico State Supreme Court No. 6716:**

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises announces its decision by Mr. Justice Noble, Chief Justice Compton, Mr. Justice Carmody, Mr. Justice Chavez and Mr. Justice Moise concurring, reversing the judgment of the District Court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby reversed, and the cause is remanded to the said District Court of Santa Fe County with instructions to vacate its judgment; substitute as a party defendant the present and acting Commissioner of the Bureau of Revenue of the State of New Mexico and to enter judgment restraining and enjoining the collection of the municipal sales tax as prayed for in the complaint, and for such other action as may be required not inconsistent with the views expressed in said opinion and this judgment.

IT IS FURTHER ORDERED that Appellant do

have and recover from Appellees its costs in this behalf expended, to be taxed by the Clerk.

(Monday, April 10, 1961)

Item 3. **Order Denying Motion for Rehearing, YOUR FOOD STORES INC., (NSL), a New Mexico Corporation, Appellant v. VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, and ROBERT VALDEZ, Commissioner of the Bureau of Revenue of the State of New Mexico, Appellees, New Mexico State Supreme Court No. 6716:**

This cause coming on before the Court on motion of Appellees for rehearing, and the Court having considered said motion and briefs of counsel and being sufficiently advised in the premises,

IT IS ORDERED that the motion for rehearing be and the same is hereby denied, and the Clerk is directed to issue Mandate forthwith.

(Thursday, June 8, 1961)

Item 4. **Mandate of Supreme Court of New Mexico, Case No. 6716:**

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Santa Fe, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered 30110 on your Civil Docket, wherein Your Food Stores, Inc., a New Mexico corporation, was Plaintiff, and Village of Espanola, New Mexico, a municipal corporation, et al., were Defendants, by

your consideration in that behalf judgment was entered against said Plaintiff; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Plaintiff by appeal, whereupon such proceedings were had that on April 10, 1961, an opinion was handed down and the judgment of said Supreme Court was entered reversing your judgment aforesaid, and remanding said cause to you:

NOW, THEREFORE, this cause is hereby remanded to you with instructions to vacate the judgment entered herein; to substitute as a party defendant the present and acting Commissioner of the Bureau of Revenue of the State of New Mexico, and to enter judgment restraining and enjoining the collection of the municipal sales tax as prayed for in the complaint, and for such other action as may be required not inconsistent with the views expressed in said opinion and the judgment of this Court.

WITNESS, The Honorable J. C. Compton, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 8th day of June, 1961.

s Lowell C. Green,
Clerk of the Supreme Court of the State of New Mexico

Costs taxed in favor of Appellant as follows:

Transcript of the Record	$103.92
Supreme Court Clerk's Costs	20.00
Total	$123.92

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Item 1. **United States Constitution, Article I, Section 8, Clause 3:**

The Congress shall have Power To * * * Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Item 2. **Act of June 20, 1910; 36 Stat. 557, Chapter 310, Section 2, Clauses 2 and 8 (New Mexico Enabling Act):**

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired

by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.

Item 3. **New Mexico Constitution, Article XXI, Sections 2 and 8, and preamble:**

Preamble. In compliance with the requirements of the act of Congress, entitled, "An act to enable the people of New Mexico to form a Constitution and state government and be admitted into the Union on an equal footing with the original states; and to en-

able the people of Arizona to form a Constitution and state government and be admitted into the Union on an equal footing with the original states," approved June twentieth, nineteen hundred and ten, it is hereby provided:

Section 2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as

the Congress of the United States has prescribed or may hereafter prescribe.

Section 8. Whenever hereafter any of the lands contained within Indian reservations or allotments in this state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.

Item 4. **Act of July 30, 1947, Chapter 389, Section 1; 61 Stat. 644; 4 U.S.C., Sections 105, 109 and 110 (Buck Act):**

Section 105.

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring after December 31, 1940. (July 30, 1947, ch. 389, 61 Stat. 644).

Section 109. Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. (July 30, 1947 ch. 389, 61 Stat. 645).

Section 110. As used in Sections 105-109 of this title — (a) The term "person" shall have the meaning assigned to it in Section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of Section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State (July 30, 1947, ch. 389, 61 Stat. 645).

Item 5. **Act of August 15, 1953, Chapter 505, Sections 6 and 7; 67 Stat. 590:**

Section 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State, to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Section 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 388

VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, et al., Petitioner,

vs.

YOUR FOOD STORES, INC., (NSL), a New Mexico corporation, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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IN THE

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No. 388

VILLAGE OF ESPANOLA, NEW MEXICO, a municipal corporation, et al., Petitioner,

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YOUR FOOD STORES, INC., (NS), a New Mexico corporation, Respondent,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

OPINIONS BELOW

The reference to the official report of the opinion in the Pacific Reporter should be 361 P. 2d. 950.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following should be added to petitioner's list:

Item A. Indian Reorganization Act (Wheeler-Howard Act), Act of June 18, 1934, Ch. 576, Sec. 16, 18 and 19; 48 Stat. 987-988; 25 U.S.C., Indians, Sec. 476, 478 and 479.

Item B. Act of February 15, 1929, Ch. 216, 45 Stat. 1185, as amended by Act of August 9, 1946, Ch. 930, 60 Stat. 962; 25 U.S.C., Sec. 231.

Item C. Section 14-6-11 New Mexico Statutes (1953 Annotated); (Laws 1903, Ch. 105, Sec. 1, as amended by Laws 1935, Ch. 53, Sec. 3, and Laws 1939, Ch. 204, Sec. 2.)

Item D. Act of December 22, 1858, 11 Stat. 374.

The pertinent text of these is set forth in Appendix A.

STATEMENT OF THE CASE

For its statement of the facts, petitioner has adopted portions of the Findings of Fact made by the District Court of Santa Fe County, the trial court (R. 52-55). These findings by the District Court, together with its Conclusions of Law (R. 55-57), constitute its decision in the case under New Mexico procedure. *Lusk vs. First National Bank of Carrizozo*, 46 N.M. 445, 130 P. 2d. 1032 (1942).

However, the "Findings of Fact" that petitioner had annexed the Pueblo lands in question (R. 54, findings Nos. 6 and 7), and that respondent's place of business was located within the Village limits (R. 52, finding No. 1), were, in reality, conclusions of law. Similarly, the "finding" that the Pueblo lands in question had not, in the words of the court, " * * * been made the subject of or brought into Santa Clara Pueblo, City or corporate limits for any purpose of municipal government or taxation as distinguished from the incident of ownership generally" (R. 53-54, finding No. 5), was a conclusion of law.

It was on the basis of its legal conclusion that the

Pueblo lands had been validly annexed that the District Court rendered judgment against respondent (R. 57-8), and it was on the ground that this legal conclusion was erroneous that respondent appealed to the New Mexico Supreme Court (R. 155, Points Relied on for Reversal) and that the Supreme Court rendered its decision reversing the District Court, saying:

> "It follows that the purported annexation of the lands in question was void and that said property is not within the corporate limits of the Village of Espanola, and that the municipal sales tax cannot be collected from appellant." (R. 363).

MATTERS AND GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

POINT I

CERTIORARI SHOULD BE DENIED BECAUSE NO REVIEWABLE QUESTION IS PRESENTED BY THE PETITION.

The petition presents two questions for review (petition 2-3). The first of these reads as follows:

> "1. Whether a municipal corporation of the state of New Mexico may, consistent with Federal law and the Santa Clara Pueblo Indians' right of self-government, impose a municipal sales tax upon a non-Indian supermarket corporation, conducting its business upon lands leased from the Santa Clara Pueblo Indians, but which lands have been annexed to and brought within the corporate limits of such municipal corporation."

As may be seen, petitioner first recites that the Pueblo of Santa Clara lands in question, on which respondent's place of business is located, have been annexed to and brought within the Village limits, and then seeks to present for review the question whether petitioner may, under these circumstances, tax respondent. This question was not decided by the New Mexico Supreme Court.

The only issue raised by Respondent in its appeal to the New Mexico Supreme Court was whether there had been a valid annexation of the Indian lands (see Respondent's Points Relied on for Reversal, R. 155), and since the Court held that the purported annexation of the lands was void, it did not reach or decide the academic question of whether petitioner might, given a valid annexation, tax respondent. Cf. *Dean Milk Co. vs. City of Madison, Wis.*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951). Therefore, in reciting that the Indian lands have been annexed to the Village and in thus assuming the validity of the annexation, petitioner has ignored the very question decided against it by the New Mexico Court.

This Court has held that it will not review questions which were not decided by the state court, *Wilson vs. Cook*, 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793 (1946), and since the present question sought to be presented for review falls into that category, respondent submits that it is not a reviewable question.

Petitioner's second question for review reads as follows:

> "2. Whether, insofar as the imposition of a municipal sales tax upon a non-Indian supermarket corporation, conducting its business upon lands leased

> from the Santa Clara Pueblo Indians, is concerned, the annexation of such Santa Clara Pueblo Indian lands by such municipal corporation is prohibited by Federal law or violates the Indians' rights of self government."

In seeking to present this question for review, petitioner makes two erroneous assumptions, first that under the state annexation statute relied on by it, it is possible to have an annexation for the limited purpose of taxing a business conducted within the annexed territory and, second, that the only test of the validity of such an annexation is whether it is "prohibited by Federal law or violates the Indians' rights of self government."

The annexation statute pursuant to which petitioner attempted to annex the Pueblo lands in question is Section 14-6-11 New Mexico Statutes (1953 Annotated) (R. 353). This statute is set out in full in Appendix A. In its opinion, the New Mexico Supreme Court considered this statute and said:

> "14-6-11 N.M.S.A. 1953 Comp., provides that territory annexed to a municipality *becomes a part of it for all purposes* and is subject to its legislative action * * *" (R. 362). (All emphases used in this brief are respondent's.)

As appears from the foregoing, the New Mexico Court has held, on the basis of the plain language of Section 14-6-11, that there can be no limited annexation of Indian or any other lands, and that territory annexed under the statute becomes a part of the annexing municipality for *all* purposes, no less. Furthermore, this holding, being a construction of a state statute by a State

Supreme Court, is binding on this Court. *United States vs. Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950). Therefore, the question whether such a limited annexation would be valid as a matter of Federal law is beside the point and not open to review.

Actually, the question decided by the New Mexico Court is that the attempted annexation of the Pueblo lands for all purposes was invalid. However, petitioner has failed to present that question for review in its petition for certiorari and this Court may therefore not consider it under its Revised Rule 22(1)(c), which provides that only those questions set forth in the petition or fairly comprised therein may be considered.

Even if this Court determines that a reviewable question is presented, respondent nevertheless submits that this is not a proper case for review, for reasons now to be argued.

POINT II

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NEW MEXICO SUPREME COURT RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

It is fundamental that this Court will not review a decision of a state court that rests on an adequate and independent state ground. *Herb vs. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945).

One of the grounds on which the present decision of the New Mexico Supreme Court rests is that to per-

mit the Village of Espanola to annex that portion of the Pueblo of Santa Clara lands in question:

> "* * * would affect the authority of the tribal council over reservation affairs and, hence, would infringe on the right of the Indians to govern themselves." (R 363).

In arriving at this conclusion, the New Mexico Court made the following material findings and observations with respect to the sovereign character of the Pueblo of Santa Clara and the right of the Indians thereof to govern themselves:

1. "The Santa Clara Pueblo owns and occupies a tract of land as communal or tribal lands patented to the Pueblo by the United States pursuant to an Act of Congress confirming a claim of a grant to the Indian tribe by the King of Spain, a former sovereignty." (R. 353).

2. "The early landmark case of *Worcester vs. Georgia* (1832), 6 Pet. 515, 31 U. S. 515, 8 L. Ed. 453, in an exhaustive opinion by Chief Justice Marshall, developed that the Indian tribes are distinct political entities, with the right of self-government, having exclusive authority within their territorial boundaries and are not subject to the laws of the State in which they are located nor to federal laws except where federal laws or the jurisdiction of courts is expressly conferred by federal legislation." (R. 354-5).

3. The Court cited Cohen's *Handbook of Federal Indian Law*, (1940 Edition) for the proposition that Indian tribes are "* * * qualified to exercise powers of self-government, not by virtue of any delegation

of powers from the Federal Government, but rather by reason of their original tribal sovereignty." (R. 355).

4. "The Pueblo Indians have the same right of self-government as other Indian tribes. The Indian Reorganization Act, 48 Stat. 984, as amended, 25 U.S.C.A., Sec. 461 et seq. See *United States v. Sandoval*, 231 U.S. 28, 58 L. Ed. 107; *United States v. Candelaria*, 271 U.S. 432, 70 L. Ed. 1023; *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429; The Pueblo Lands Act, 43 Stat. 636." (R. 356).

5. "The Santa Clara Pueblo adopted and acts under a written constitution. *Federal Indian Law*, p. 915. It is conceded that the Santa Clara Pueblo is self-governing." (R. 357).

The New Mexico Court then went on to say:

> "There has been no question since *United States v. Sandoval*, supra, that the Pueblo Indians do not derive their governmental powers from the State of New Mexico. *Toledo v. Pueblo de Jemez*, supra. *It must, likewise, be conceded that two self-governing bodies cannot have dual and co-existent jurisdiction and control within the same territory at the same time. In re Sandia Conservancy District*, 57 N.M. 413, 259 P 2d. 577. *They are not here exercising functions for different purposes within the same boundary.*" (R. 361).

and to conclude, as stated above, that to allow the annexation would affect the authority of the tribal council over Pueblo affairs and infringe on the right of the Indians to govern themselves.

Respondent submits that this holding by the New Mexico Court is based on the underlying principle of New Mexico law, italicized above, that two self-governing bodies, functioning for the same purposes, cannot have dual and co-existent jurisdiction and control within the same territory at the same time, the court citing its own decision in *In Re Sandia Conservancy District*, 57 N.M. 413, 259 P. 2d. 577 (1953) in support of this principle.[1]

As may be seen from those portions of its opinion quoted above, the New Mexico Court examined into such decisions of this Court as *Worcester vs. Georgia*, and such acts of Congress as the Indian Reorganization Act, both cited and discussed infra, as well as other authorities, in order to determine the nature and extent of the Pueblo's rights of self-government. The court noted that the Pueblo Indians, like other Indian tribes, are qualified to exercise powers of self-government, not by delegation from either the federal or state governments, but by reason of their original sovereignty; that the Pueblo of Santa Clara operates under a written constitution, and that it was conceded that the Pueblo is self-governing. However, in holding that the annexation would infringe on the Pueblo's rights of self-government, the New Mexico Court did not attempt to add to or substract from such rights but, taking such rights as it found them and in recognition thereof, held that the Village could not annex the Pueblo lands, for to allow it to do so would create a situation where two self-governing bodies, the Pueblo and the Village, functioning for the same purposes, the local government of the lands of their domains, would be exercising

[1] In accord is **City of El Paso vs. States**, infra, where the Texas Court of Civil Appeals said that it is elementary that two municipal corporations cannot exercise the same general governmental authority over the same area.

"dual and co-existent jurisdiction and control within the same territory at the same time", contrary to the rule of *Sandia Conservancy District*.

In *Herb v. Pitcairn*, supra, this Court held that its only power over decisions of state courts is to correct them to the extent that they incorrectly adjudge federal rights. It should be emphasized that the Village of Espanola has no federally created or supported right to annex the Pueblo lands in question. Its power to annex such Indian lands or any other lands and, indeed, its very existence rests on the state law of New Mexico. *Laramie County vs. Albany County*, 92 U.S. 307 at 308, 23 L. Ed. 552 (1875). *Munro vs. City of Albuquerque*, 48 N.M. 306, 150 P. 2d. 733 (1943); Annotation 64 A.L.R. 1341. Therefore, in holding that the Village could not annex the Pueblo lands, the New Mexico Court did not deny any federal right, but only the claimed right of a state municipality to extend its boundaries under a state annexation statute. This Court has held that it is bound by the decisions of the highest courts of the states as to the powers of their municipalities under state law. *Railroad Commission of California vs. Los Angeles Railway Corporation*, 280 U.S. 145, 50 S. Ct. 71, 74 L. Ed. 234 (1929); *Georgia Railway & Power Co. vs. Town of Decatur*, 262 U.S. 432, 43 S. Ct. 613, 67 L. Ed. 1065 (1923).

As shown, the holding by the New Mexico Court that the annexation would infringe on the Pueblo's rights of self-government is based on the underlying and controlling principle of state law that two self-governing bodies, exercising the same functions for the same purposes, cannot have simultaneous jurisdiction and control over the same area. This is the state of affairs which the Court has said

would arise from the annexation of the Pueblo Lands and which, in the exercise of its exclusive perogative to determine the powers of a state municipality under state law, it has said cannot be permitted to exist under the rule of *Sandia Conservancy District*. Even were this Court inclined to disagree and to hold that the annexation would not unduly infringe on the Pueblo's rights of self-government, still the case would not be reviewable because the decision of the state court resting on a substantial independent state basis, this Court has held that it will not inquire whether the state court's ruling is right or wrong, and will not substitute its views of what the proper ruling should be for those of the state court. *Demorest vs. City Farmers Trust Co.*, 321 U.S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1944).

The decision of the New Mexico Supreme Court rests on still another grounds, namely, that the State of New Mexico has no such jurisdiction over the Pueblo of Santa Clara lands as would enable it to confer on the Village of Espanola the power and authority to annex that portion of the Pueblo lands in question. This conclusion by the New Mexico court was based primarily upon the disclaimer to Indian lands and upon the reservation of absolute jurisdiction and control over such lands to Congress contained in the New Mexico Enabling Act, Act of June 20, 1910, 36 Stat. 557, Ch. 310, Sec. 2, paragraph Second, and adopted in the New Mexico Constitution, Article XXI, Sec. 2. Unquestionably these provisions include the Pueblo Indians and their lands. New Mexico Enabling Act, Sec. 2, paragraph Eighth, and New Mexico Constitution, Article XXI, Sec. 8 (All provisions of the Enabling Act and State Constitution referred to are set out in full at Petition 40-43).

Certainly to the extent that this holding was based on a construction of the New Mexico Constitution, a state and not a federal question was decided, *Re Murchison*, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). However, even if this Court determines that a federal question was decided and that the New Mexico Court's holding on such federal question was incorrect, still the case is not reviewable because, as has been shown, the New Mexico Court's decision rests on an adequate and independent state ground and this Court has said that, under these circumstances, it will not review the decision of a state court even though the state court has "* * * summoned to its support an erroneous view of Federal law." *Radio Station WOW, Inc. vs. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945).

POINT III

CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION OF WHETHER A STATE OR ITS POLITICAL SUBDIVISIONS MAY ANNEX INDIAN LANDS HAS HERETOFORE BEEN DETERMINED BY THIS COURT IN *WORCESTER VS. GEORGIA*, INFRA, AND THE DECISION OF THE NEW MEXICO SUPREME COURT IS IN ACCORD WITH *WORCESTER* AND OTHER APPLICABLE DECISIONS OF THIS COURT, AS WELL AS APPLICABLE ACTS OF CONGRESS.

Respondent has argued that certiorari should be denied because the decision of the New Mexico Supreme Court rests on an adequate and independent state ground. However, even if this Court deems that the questions de-

cided by the New Mexico Court are exclusively federal, respondent nevertheless submits that the case is not an appropriate one for review. In Rule 19(1) of the Revised Rules of this Court, it is stated that certiorari will be granted only where there are special and important reasons therefor giving, as illustrative of the character of the reasons which will be considered:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The question of whether a state or its political subdivisions may annex Indian lands was answered in the negative by this Court in *Worcester v. Georgia*, 6 Pt. 515, 8 L. Ed 483 (1832). In *Worcester* this Court had before it an Act of the Georgia Legislature (set out in full at 6 Pet. 524-528) sections 1 to 5 of which purported to annex specified portions of the Cherokee reservation to various Georgia counties. For example, Section 3 of the Act provided:

> "Sec. 3. That all that part of the said territory lying north of the last-mentioned line, and south of a line commencing at the mouth of Baldridge's creek; thence up said creek to its source; from thence to where the federal road crosses the Hightower; thence with said road to the Tennessee line, *be and the same is hereby added to, and shall become part of, the county of Gwinnett.*"

Worcester had been convicted of residing in the Cherokee nation without a license from the Georgia Governor. Specifically, the indictment charged that Worcester had resided in that part of the Cherokee nation attached by

the above-quoted Section 3 to the County of Gwinnett. In Worcester's plea to the indictment he contended that the Georgia law which purported to annex the Cherokee reservation to the several Georgia counties was unconstitutional and void. On Writ of Error, this Court, in an opinion by Chief Justice Marshall, sustained Worcester's plea and held his conviction void, saying:

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. * * *
>
> If the view which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself."

The Indians of the Pueblo of Santa Clara occupy the same sovereign self-governing status as the Cherokees or any other Indian tribe. *United States vs. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913); *Toledo vs. Pueblo de Jemez*, 119 F. Supp. 429, D.C.N.M. (1954). Therefore, the attempted annexation of the Santa Clara Pueblo lands in question by the Village of Espanola is no different from the attempted annexation of the Cherokee lands by the State of Georgia. *Worcester* held the attempted annexation of the Cherokee lands void and the New Mexico Supreme Court, in accord with and following *Worcester*, as well as more recent decisions of this Court, held the attempted annexation of the Pueblo lands void.

In order to show that the decision of the New Mexico Court is in accord with other applicable decisions of this Court, as well as applicable Acts of Congress, it will be necessary for respondent to make some response to the points relied on by petitioner.

Response to Petitioner's Point I

The principles of *Worcester* were re-affirmed by the decision of this Court in the recent case of *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). Petitioner argues (petition 9-10) that *Williams* is distinguishable for the reasons that:

1. In *Williams* the defendant was an Indian, while here neither party is an Indian.

   The answer is that the lands involved are Indian lands.

2. The tax is not sought to be imposed on an Indian or Indian transaction.

The answer is that unless the Village validly annexed the Pueblo lands, it has no taxing power over or within such lands whatsoever.

3. The *Williams* suit was within the jurisdiction of the Navajo court, while here the Pueblo would have no jurisdiction over petitioner or respondent in their dealings with each other.

   The answer is that while the Pueblo may have no jurisdiction over petitioner and respondent in their dealings inter se, it does have jurisdiction over the lands of its domain which the Village attempted to annex.

4. The Pueblo of Santa Clara is not a treaty nation as was the Navajo tribe in Williams.

   The answer is that the Indians of the Pueblo of Santa Clara occupy the same status as treaty Indians, such as the Navajos in *Williams* and the Cherokees in *Worcester*, *United States vs. Sandoval*, supra; *Toledo vs. Pueblo de Jemez*, supra.

5. Congress had passed no legislation authorizing the Williams suit to be brought in the state courts of Arizona.

   The answer is that Congress has likewise passed no legislation authorizing the Village to annex Pueblo lands.

In *Williams* this Court stated the test of state power over Indian affairs as follows:

> "Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

So in the present case (putting aside for the moment the applicable acts of Congress which, respondent submits, themselves preclude the annexation of Pueblo lands) the question is whether the attempted annexation of their lands would infringe on the right of the Indians of the Pueblo of Santa Clara to make their own laws and be ruled by them. In *Williams* this Court held that a non-Indian who sold goods to an Indian on credit on the Navajo reservation in Arizona could not bring suit to collect for the same in the state courts of Arizona, saying:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. * * * *The cases in this Court have consistently guarded the authority of Indian governments over their reservations.* * * *"*

If as held in *Williams*, the adjudication of rights under a contract made on the Navajo reservation, between an Indian and a non-Indian, rests in the jurisdiction of the Navajo courts to the exclusion of the Arizona courts, then surely it must be true in the present case, as held by the New Mexico Court, that the right to exercise governmental power and authority over the Pueblo domain itself, as between the Pueblo government and a non-Indian Village government, rests in the Pueblo government to the exclusion of the Village government.

Petitioner argues that the annexation of the Pueblo lands and the resulting imposition of a tax on respondent

would not, per se, infringe on the rights of the Indians. However, as shown earlier, Section 14-6-11 New Mexico Statutes (1953 Annotated), under which the Village attempted to annex the Pueblo lands, does not provide for a limited annexation for tax purposes only. On the contrary it provides that the annexed area becomes a part of the annexing municipality "for all purposes". Therefore, if the attempted annexation should be upheld, this would necessarily mean that the Village would have the right not merely to tax respondent, but to exercise general governmental power and authority over and within the Pueblo lands, legislative, executive and judicial. The statutory powers conferred on New Mexico municipalities are contained in Volume 3 New Mexico Statutes (1953 Annotated), Chapter 14, Articles 1 to 48, and include broad powers with respect to zoning, planning, urban renewal and the like. Although respondent will not undertake to catalog these powers, they are listed in some detail at pages 21 to 24 of the Brief-in-Chief filed by the Pueblo as Amicus Curiae in the New Mexico Supreme Court (R. 247-250). After reviewing these powers, counsel for the Indians said:

> "If New Mexico municipalities may lawfully annex restricted Indian land and thereby make the Indian land a part of the municipality 'for all purposes', the various zoning, improvement and Renewal Laws should apply. In those unhappy circumstances, what would happen to the unique Pueblos, say the Pueblo of Taos, for example? There would be a field day for planners."

Respondent submits that to permit this battery of municipal powers to come into play on the Pueblo lands would be in irreconcilable conflict with and would, per se,

infringe upon the authority of the Pueblo government over its own lands, which authority, this Court said in *Williams* it has consistently guarded against state infringement.

In *Williams* this Court referred to the Wheeler-Howard Act, also known as the Indian Reorganization Act, Secs. 16, 17, 48 Stat. 987, 988, 25 U.S.C. 476, 477, and said that Congress had thereby "* * * encouraged tribal governments and courts to become stronger and more highly organized." This Act applies to the Pueblo of Santa Clara,[2] and pursuant thereto the Pueblo of Santa Clara has adopted and now operates under a written constitution. *Federal Indian Law*, p. 915. [3, 4] Obviously a Congressional policy of encouraging the government of the Pueblo of Santa Clara to become stronger would not be consistent with subordinating that government to a Village government of no greater dignity, yet to uphold the attempted

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[2]The Pueblos are expressly included within the definition of an Indian tribe contained in Section 19 of the Act, 48 Stat. 988, 25 U.S.C. Sec. 479. The Pueblo of Santa Clara voted in favor of the application of the Act in a referendum election held pursuant to Section 18 of the Act, 48 Stat. 988, 25 U.S.C. Sec. 478. **Federal Indian Law,** p. 911. These provisions of the Act are set out in Appendix A.

[3]An authenticated copy of this constitution, and of the Pueblo bylaws, were offered in evidence, but the offer was refused on the grounds that the exhibit was not material, the Village having admitted that the Pueblo is self-governing (Plaintiff's Ex. No. 15, R. 120). The exclusion of this exhibit was respondent's Point II relied on for reversal in the New Mexico Supreme Court (R. 154), but the court did not rule on the point even though it noted the existence of the constitution in its opinion (R. 357). Respondent feels that the exhibit was material and should have been admitted. If this Court agrees, the original is on file with the Clerk and available for examination.

[4]**Federal Indian Law** is a publication of the United States Department of the Interior. All citations herein are to the 1958 edition, which is a revision of the 1940 edition cited by the New Mexico Court in its opinion.

annexation and thus to give the Village the right to exercise general governmental authority over the Pueblo domain would have just that result.

Petitioner finds nothing "sacred" in the Indian lands which would prevent the Village from annexing them. Suffice it to say that the Pueblo does not agree, as evidenced by the briefs filed on behalf of the Indians as Amicus Curiae in the New Mexico Supreme Court (Brief-in-Chief, R. 220-276; Reply Brief, R. 310-324, and Brief in Opposition to Motion for Re-Hearing, R. 379-390).

It is true that in *Williams* this Court said that it has modified the principles of *Worcester* in cases where the rights of the Indians would not be jeopardized, giving the examples that suits by Indians against outsiders in state courts have been sanctioned, and that state courts have been allowed to try non-Indians committing crimes against each other on Indian lands. However, it is also true that in *Williams* this Court said that the basic policy of *Worcester* has remained unchanged, and respondent submits that to allow the authority of the Pueblo government to be undermined by a minor political subdivision of the State of New Mexico would not be a mere modification of the rules of *Worcester*, but a complete abandonment thereof.

Utah Northern Railway vs. Fisher, 116 U.S. 28, 6 S. Ct. 264, 29 L. Ed. 542 (1885), is distinguishable because the territory on which the railroad property was located had been ceded by the Indians to the United States and by the United States to the railroad, with the result that such territory had been completely withdrawn from the reservation (see p. 32 of the United States Reports). *Maricopa & Phoenix Railroad vs. Arizona*, 156 U.S. 347, 15 S. Ct. 391, 39 L. Ed. 447 (1895), is distinguishable on

the same basis (see p. 351 of the U. S. Reports). The Pueblo lands involved belong to the Pueblo as a part of its grant lands (R. 53). *Truscott vs. Hurlbut Land & Cattle Co.*, 73 Fed. 60, C.C.A. 9 (1896), and *Wagoner vs. Evans*, 170 U.S. 588, 18 S. Ct. 730, 42 L. Ed. 1154 (1898), are distinguishable because they involved state or territorial taxes on property found to be within the state or territorial boundaries. The tax here involved, being a municipal tax, cannot be imposed unless the Village validly annexed and thus brought the Indian lands within its municipal boundaries.

Petitioner relies on *Howard vs. Commissioners*, 344 U.S. 624, 73 S. Ct. 464, 97 L. Ed. 617 (1953). Respondent submits that *Howard* is distinguishable for the following reasons:

1. The difference between a federally owned naval ordnance plant and an Indian nation is apparent.

2. The Indians of the Pueblo of Santa Clara are sovereign and, within the Pueblo domain, possess and exercise the power of local self-government. The ordnance plant had no residents occupying such sovereign self-governing status.

3. In *Howard* this Court held that the annexation did not interfere with the exercise of jurisdiction by the United States within the ordnance plant area. The United States, operating at the federal level, and the City of Louisville, operating at the municipal level of government, were each exercising separate and distinct functions and it was held that the sovereign rights in the resulting dual relationship were not antagonistic, accomodation and co-operation being their aim. *Howard* is merely an example

of the dual relationship which is the hallmark of our federal-state system of government. In contrast, the Pueblo of Santa Clara has never been and does not now constitute a part of our federal system of government. It is a distinct political entity, *Worcester v. Georgia*, supra, whose governmental rights are not derived from either the United States or the State of New Mexico, but from its original tribal sovereignty. *Toledo v. Pueblo de Jemez*, supra; *Talton v. Mayes*, 163 U.S. 376, 16 S. Ct. 986, 41 L. Ed. 196 (1896). Moreover, the Pueblo of Santa Clara operates at the same local level of government as the Village of Espanola. The very word "Pueblo" is defined in the Spanish language as an inhabited town or village. *United States v. Varela*, 1 N.M. 593 at 598 (1874). The Pueblo governments have been classified as municipal in character *Garcia v. U. S.*, 43 Fed. 873, C.C.A. 10 (1930); *Federal Indian Law*, p. 396. Therefore, to allow the Village to annex and thus to exercise general governmental powers within the Pueblo area, would necessarily interfere with and infringe on the Pueblo's right to exercise the same powers in the same area, and the sovereign rights in such a relationship would necessarily be antagonistic for, as stated in *City of El Paso vs. State*, 209 S.W. 2d 989 (Tex. Civ. App. 1947):

> "Two municipal corporations cannot exercise the same general governmental authority over the same area. This proposition is elementary and is sustained by all precedents without disagreement."

There was no element of accomodation or co-operation in the Village's attempt to annex the Pueblo lands. The Pueblo did not sign the annexation petition and the Village acted ex parte (R. 362).

4. The annexation in *Howard* was not challenged by the United States. The present annexation has been challenged by the Indians as well as respondent (R. 220-276, 310-324, 379-390).

Response to Petitioner's Point II

Petitioner argues that the Buck Act, Act of July 30, 1947, Ch. 389, Sec. 1, 61 Stat. 641 as amended, 4 U.S.C. Secs. 105-110, gives it the right to tax respondent, but this Act does not aid petitioner for two good reasons:

1. Under Section 105(a) of the Act, only a state or state taxing authority "* * *" having jurisdiction to levy such a tax "* * *" is empowered to levy and collect a sales tax in a federal area. Since the New Mexico Supreme Court held that the Pueblo area in question was not validly annexed, the Village is not a taxing authority having jurisdiction to levy a tax within such area.

Petitioner says that this holding:

> "* * *" is in complete disregard of Section 108 of the Buck Act which states that it shall not be deemed to deprive the United States of exclusive Federal jurisdiction where it would otherwise have such exclusive jurisdiction." (Petition 15)

Petitioner misapprehends the meaning of Section 108 which is, merely, that the provisions of the Act granting states and state taxing authorities the power to levy taxes in federal areas, *Assuming they otherwise have jurisdiction to do so*, shall not be deemed to diminish the jurisdiction which the United States has over the particular area in question.

2. Moreover, the Pueblo area in question is not a "Federal area". The term is defined in Section 110(e) of the Act as follows:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; * * *"

Since the Pueblo of Santa Clara holds the title to its lands in communal fee simple ownership, *United States v. Sandoval*, supra, its lands are obviously not "* * * held or acquired by or for the use of the United States or any department, establishment, or agency of the United States * * *" and, therefore, are not a "Federal area" within the meaning of the Buck Act definition.

Petitioner points to Section 109 of the Act as evidence that Congress intended to include Indian lands within its definition of a "Federal area". Perhaps those Indian reservations to which the United States holds the legal title, with the Indians having only the right of use and occupancy, could be considered to be "Federal areas" under the Act, but the Pueblo of Santa Clara holds the fee simple title to the lands here involved. Moreover, it is a recognized historical fact that the Pueblo Indians are an entirely different class of people than the nomadic and warlike Indians, such as the Navajos or Apaches in New Mexico. *Federal Indian Law*, p. 889. The latter had to be subdued by military force and, pursuant to treaties between them and the United States, now occupy "reservations" consisting of large areas of land set aside for them out of the public domain by the federal government. In contrast, the Pueblo Indians have always been a village people, following agricultural pursuits, and received

grants to the villages already occupied by them from the Spanish government. The grant to the Pueblo of Santa Clara was confirmed by Act of Congress. Act of December 22, 1858, 11 Stat. 374, Ch. V. Consequently, regardless of what the situation may be in respect to the taxability of these Indian "reservations", the Pueblo of Santa Clara, owning its lands in fee, duly confirmed by Act of Congress, is not a federal area subject to taxation by the Village under the Buck Act or otherwise.

Petitioner suggests that it is an "inequitable situation" that businesses within the Village limits are required to pay Village taxes while respondent, being without the Village limits, is relieved from the payment of such taxes and is given a "competitive advantage over neighboring supermarkets." There is nothing in the record to support the statement that respondent has a competitive advantage over any other business, indeed, this would be entirely immaterial, because respondent has no more advantage than any other business which happens to be located outside the Village limits.

Response to Petitioner's Point III

Not only did the New Mexico Supreme Court hold that the attempted annexation would infringe on the right of the Indians to govern themselves, but it further held, as an additional ground for striking down the annexation, that the disclaimer to and reservation of absolute jurisdiction and control over Indian lands to Congress contained in the New Mexico Enabling Act, Act of June 20, 1910, 36 Stat. 557, Ch. 310, Sec. 2, and adopted in the New Mexico Constitution, Article XXI, Section 2, itself precluded the annexation.

The substance of petitioner's argument under this

point is that the New Mexico Supreme Court has held, and now takes the view that the state has "* * * absolutely no jurisdiction for any purpose * * *" over Indian lands with the result that "* * * crimes committed by non-Indians against non-Indians on Indian reservations will go unpunished by virtue of a lack of jurisdiction in any court to try the offender" (Petition 18 and 20).

Respondent does not feel that this is a fair statement of the position of the New Mexico Court which, in its opinion, said:

> "To our minds, the terms upon which New Mexico was admitted as one of the states of the Union and Article XXI, Sec. 2 of our Constitution, left no room for a claim by the state to governmental power over the Indians or Indian lands, *except where such jurisdiction has been specifically granted by Act of Congress, or sanctioned by the decisions of the Supreme Court of the United States.*" (R. 356).

The italicized language shows that the Court recognized that Congress may act affirmatively to grant New Mexico such jurisdiction as it may see fit and later in its opinion (R. 358) the Court noted an instance where Congress has in fact done so, by making state health and compulsory school attendance laws applicable to Indian lands, citing Title 25 U.S.C.A., Sec. 231.[5]

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[5] Act of February 15, 1929, Ch. 216, 45 Stat. 1185, as amended by Act of August 9, 1946, Ch. 930, 60 Stat. 962, 25 U.S.C., Sec. 231 set forth in Appendix A.

It is interesting to note that this Act provides that state compulsory school attendance laws shall not apply to the Indians of any tribe having a duly constituted governing body, until such body had adopted a resolution consenting to the application of such laws. Yet here, the Village claims the right to exercise general governmental powers on the Indian lands without the consent of Congress and without the consent of the Indians.

The New Mexico Court also recognized that this Court has announced certain judicial exceptions to the rule of Worcester, saying:

> "Suits by Indians against non-Indians in state court have been sanctioned by the United States Supreme Court, Felix v. Patrick, 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719. And non-Indians who committed crimes against each other on a reservation may be tried in the state courts. New York ex rel Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261. These are modifications of the principles of Worcester v. Georgia, supra, made over the years by the Supreme Court of the United States as not jeopardizing the rights of Indians nor involving essential tribal relations or the right of self-government. Williams v. Lee, supra." (R. 358-9).

It is therefore apparent that the New Mexico Supreme Court has not held and does not take the view that the state has no jurisdiction over Indian lands for any purpose whatsoever. Moreover, by its reference to *New York ex rel. Ray vs. Martin*, it is apparent that the New Mexico court is fully aware that crimes committed by non-Indians against non-Indians on Indian land may be tried in the state courts. Respondent submits that the true holding of the New Mexico court in this respect is that under the plain provisions of the Enabling Act and New Mexico Constitution, and under the rule of *Worcester*, even as modified in recent years, the state lacked the requisite jurisdiction over the Pueblo lands involved to enable it to confer on the Village the power or authority to annex the same.

Indian voting rights have nothing to do with the issues in this case.[6]

Response to Petitioner's Point IV

Petitioner argues that prior to the Act of August 15, 1953, Ch. 505, Sec. 6, 67 Stat. 590, it had the right to annex the Pueblo lands involved, and that the Act did not divest it of that right. For convenience, the Act is here set out in full:

> "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any *legal impediment* to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended

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[6] The New Mexico Constitution, Article VII, Sec. 1, prescribing qualifications for voters, excludes "Indians not taxed". On August 11, 1948, a three-judge Federal District Court sitting in the unreported case of **Trujillo vs. Garley**, D.C.N.M., Civil No. 1353, held that the New Mexico Indians were entitled to vote because Article VII, Sec. 1 constituted a discrimination on the grounds of race contrary to the Fourteenth and Fifteenth Amendments to the United States Constitution. A portion of the transcript of the court's oral opinion is quoted in **Federal Indian Law**, p. 531, as follows:

> "* * * Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications of a voter, must have paid a tax * * *

The Indians have voted ever since.

their State constitution or statutes, as the case may be."

In its opinion the New Mexico Supreme Court noted that New Mexico has not seen fit to amend her Constitution so as to accept jurisdiction over Indians under this Act (R. 357). The significance of her failure to do so is shown by the legislative history of the Act contained in House Report appearing in 1953 U.S. Code, Cong. and Adm. News, Vol. 2, page 2412, the material part of which reads as follows:

> "Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states, contain express disclaimers of jurisdiction. Included are * * * New Mexico * * * Effect of the disclaimer of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure."

As may be seen, the viewpoint of Congress is that the effect of the reservation to Congress of absolute jurisdiction and control over Indian lands contained in Article XXI, Section 2, of the New Mexico Constitution, is to "retain exclusive Federal jurisdiction" over such lands until the Indian title is extinguished and, moreover, that such reservation of jurisdiction constitutes, in the words of the Act, a "legal impediment" to the assumption of state civil and criminal jurisdiction over Indians. It is

equally significant that the only jurisdiction which Congress, by the Act, is willing to give New Mexico, is Court jurisdiction over civil and criminal causes involving Indians, not general and unlimited jurisdiction such as would be required for the Village to annex the Pueblo lands.

Respondent submits that the Village lacked the power to annex Pueblo lands at the time of its purported annexation of the Pueblo lands in question, and that it will continue to lack the power to do so unless and until Congress enacts appropriate legislation granting New Mexico the requisite jurisdiction over Indian lands.

CONCLUSION

Respondent has argued that certiorari should be denied under three main points. These are:

I. No reviewable question is presented by the petition: Petitioner has sought to present two questions for review. In the first of these it assumes there has been a valid annexation of the Pueblo lands and then seeks to present the question whether, under these circumstances, it may tax respondent. Since the New Mexico Supreme Court held there had not been a valid annexation, it did not reach or decide this question, and the question is therefore nonreviewable.

In its second question for review petitioner seeks to present the question whether an annexation of the Pueblo lands for the purpose of taxing respondent is "prohibited by Federal law or vio es the Indians' rights of self government." Since the New Mexico Court held, as a matter of state law, that under the state annexation statute pursuant to which the Village attempted to annex the

Pueblo lands, the territory annexed becomes a part of the annexing municipality for all purposes, the question whether an annexation for less than all purposes would be valid, as a matter of federal law, is not open to review.

II. The decision of the New Mexico Court rests on an adequate and independent state ground: The holding by the New Mexico Court that to allow the Village to annex the Pueblo lands would infringe on the right of the Indians of the Pueblo to govern themselves, is based on the underlying principle of state law that two self-governing bodies of equal dignity, the Pueblo and the Village, functioning for the same purposes, the local government of the lands of their domains, cannot be permitted to have simultaneous jurisdiction and control within the same territory at the same time. The Village has no federal right to annex the Pueblo lands and its right to extend its boundaries rests on state law. The New Mexico Court has held, as a matter of state law, that the Village had no power to annex the Pueblo lands and this Court is bound by that decision.

III. The question of whether a state or its political subdivisions may annex Indian lands has heretofore been determined by this Court: In *Worcester vs. Georgia*, supra, this Court held that Georgia had no power to annex the Cherokee reservation. The attempt by the Village of Espanola to annex the Pueblo of Santa Clara lands in question is no different from the attempt by Georgia to annex the Cherokee lands, and the decision of the New Mexico Court that the Village had no power to annex such Pueblo lands is in accord with *Worcester*. In order to show that the decision of the New Mexico Court is in accord with other applicable decisions of this Court, as well as applicable Acts of Congress, respondent has

argued in response to the points relied on by petitioner. These are:

1. The decision of the New Mexico Court is in accord with the recent decision of this Court in *Williams vs. Lee*, supra, which reaffirmed the basic principles of *Worcester*. To allow the Village to annex and therefore to exercise general governmental authority over and within the Pueblo lands, in the form of a multitude of statutory municipal powers, would infringe upon the authority of the Pueblo government over the Pueblo domain, which authority this Court said in *Williams* it has consistently guarded against state infringement. This Court noted in *Williams* that Congress, by the Indian Reorganization Act, has sought to encourage Indian governments to become stronger and more highly organized, and this policy would be subverted by permitting a municipal government of no greater dignity to overrun the Pueblo government. *Howard vs. Commissioners*, supra, is distinguishable because the Pueblo is entirely different from and unrelated to the ordnance plant there involved. The Pueblo has never been and is not now a part of our federal-state system of government although, by virtue of their original tribal sovereignty, the Indians of the Pueblo are a sovereign self-governing political entity. The Pueblo is itself municipal in character and operates at the same municipal level of government as the Village. It is elementary that two municipal bodies cannot exercise the same general governmental authority over the same area. The Pueblo did not consent to the annexation and appeared in the state court as Amicus Curiae to oppose it.

2. The Buck Act does not apply because the Village is not a taxing authority having jurisdiction to levy a sales tax under Section 105(a) of the Act. Moreover, since

the Pueblo holds the fee simple title to its lands it is not a "Federal area" as defined in the Act.

3. The New Mexico Supreme Court has not held that the state has no jurisdiction over Indian lands for any purpose, but it has correctly held that in view of the reservation of absolute jurisdiction and control over Indian lands to Congress contained in the New Mexico Enabling Act and State Constitution, and in view of the rule of *Worcester*, even as modified by this Court, the state lacked the requisite jurisdiction to enable it to confer on the Village the power to annex the Pueblo lands involved.

4. The Act of August 15, 1953, and the House Report thereon appearing in the body of the brief, show that from the viewpoint of Congress the reservation to Congress of absolute jurisdiction and control over Indian lands contained in the New Mexico Constitution, constitutes a "legal impediment" not only to the assumption of state civil and criminal jurisdiction over Indians under the Act, but a fortiori, to the assumption of the general and unlimited jurisdiction which would be required for the Village to annex the Pueblo lands. The Village will have no such power unless Congress enacts legislation granting New Mexico the necessary jurisdiction over Indian lands.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

ITEM A. INDIAN REORGANIZATION ACT (WHEELER-HOWARD ACT), ACT OF JUNE 18, 1934, CHAPTER 576, SECTIONS 16, 18 and 19; 48 STAT. 987-988; 25 U.S.C., INDIANS, SECTIONS 476, 478 and 479.

Section 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing

of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Section 478. Acceptance of sections 461 to 479 optional

Sections * * * 476-478, and 479 of this title shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Section 479. Definitions

The term "Indian" as used in sections * * * 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe,

organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years.

ITEM B. ACT OF FEBRUARY 15, 1929, CHAPTER 216, 45 STAT. 1185, AS AMENDED BY ACT OF AUGUST 9, 1946, CHAPTER 930, 60 STAT. 962; 25 U.S.C., SECTION 231.

Section 231. Enforcement of state laws affecting health and education; entry of state employees on Indian lands.

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

ITEM C. SECTION 14-6-11 NEW MEXICO STATUTES (1953 ANNOTATED): (LAWS 1903, CHAPTER 105, SECTION 1, AS AMENDED BY LAWS 1935, CHAPTER 53, SECTION 3, AND LAWS 1939, CHAPTER 204, SECTION 2.)

14-6-11. Petition for annexation by owners of territory contiguous to municipality — Duty of council or board — Resolution. — Whenever a petition asking for the annexation of contiguous territory to any city, town or village shall be presented to the city council of any city or board of trustees of any town or village, which petition is signed by owners of a majority of the number of acres in such contiguous territory sought to be annexed, accompanied by a survey and a plat of the contiguous territory sought to be annexed, it shall be the duty of the city council or board of trustees of any such city, town or village to whom said petition is so presented to express by resolution their consent or rejection to the annexation of such contiguous territory. In the event that such resolution shall consent to the annexation of such territory, a copy of the resolution, together with a copy of the plat of the territory so annexed, shall be filed in the office of the county clerk of the county in which said municipality is situate, and from and after such filing, the said contiguous territory shall be included in and a part of said municipality for all purposes.

ITEM D. ACT OF DECEMBER 22, 1858, 11 STAT. 374, CHAPTER V.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Pueblo land claims in the Ter-

ritory of New Mexico designated in the corrected lists as * * * K, Pueblo of Santa Clara * * * reported upon favorably by the surveyor-general of New Mexico, in his report of the thirtieth of September, eighteen hundred and fifty-six, to the Department of the Interior, * * * be, and they are hereby, confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist.